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Nos. 85-1626 and 85-2010

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, ET AL.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., PETITIONERS

v.

CHARLES GOODMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a labor union can be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or 42 U.S.C. 1981 on the ground that it has passively acquiesced in the employer's discrimination by the manner in which it has handled grievances.

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INTEREST OF THE UNITED STATES

The United States has responsibility for enforcing statutes prohibiting discrimination in employment on account of race. See, *e.g.*, 42 U.S.C. 2000e-5(f). The federal government, as the nation's largest employer, will also be affected by the outcome of this case in its dealings with unions representing federal employees. See 42 U.S.C. 2000e-16.

The United States has no significant interest or particular expertise in the questions presented by the petition in No. 85-1626 – *i.e.*, the appropriate period of limitations for actions brought under 42 U.S.C. 1981 and the retrospective application of *Wilson* v. *Garcia*, 471 U.S. 261 (1985) – and accordingly we will not address those issues in this brief.

STATEMENT

1. The plaintiffs in this case are seven black employees or former employees of Lukens Steel Company ("Lukens"), and the United Political Action Committee of Chester County. They represent the class of all blacks who have been employed by Lukens since June 14, 1967. The defendant unions, the United Steelworkers of America and two of its locals, Local 1165 and Local 2295, are the certified collective bargaining agents of Lukens' hourly employees. This action was filed in July 1973, alleging inter alia that Lukens had discriminated against plaintiffs with respect to wages, promotions, transfers, discipline, testing, discharges of probationary employees, and workplace environment, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or 42 U.S.C. 1981. The unions were also alleged to have been liable for violations of these statutes. Pet. App.[1] 5a-6a, 56a, 59a-61a.[2] Of particular relevance to this case is plaintiffs' allegation that the unions violated Title VII by "[f]ailing to fairly and adequately process grievances on behalf of black employees"; "[f]ailing to represent black persons effectively by passively permitting the employer to discriminate against black persons"; and "[f]ailing to act affirmatively to cause the employer to refrain from discriminating against black employees" (J.A. 7).

The case was tried in 1980. See J.A. 1-2. In February 1984, the district court issued findings of fact and conclusions of law, holding that plaintiffs had proven some but not all of their claims. Pet. App. 50a-150a; see also *id.* at 5a-6a.

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[1] Pet. App. citations refer to the petition filed in No. 85-2010.

[2] Local 2295 has about 80 members, and since 1967 has never had more than 12 black members. Local 1165 has about 2,600 members, of whom about 25% are black. Blacks have been active in this local. Pet. App. 133a.

a. With respect to the unions, the district court found that the departmental seniority system was created and maintained by the unions and Lukens in good faith, and that both black and white employees overwhelmingly preferred it to a plant-wide system. Blacks participated actively in negotiating the collective bargaining agreements that embodied this system, and never suggested a change in it. Pet. App. 71a.

The district court also found that while there were deficiencies in the way the unions processed employees' grievances, there was no proof that this resulted in any greater disadvantage to blacks than to whites. The deficiencies were apparently created at least in part by the volume of grievances—about 8,000 were filed during the limitations period (which the district court held to have run from April 7, 1971, onwards under Title VII, and from July 15, 1967, onwards under Section 1981 (Pet. App. 58a)). The number of grievances steadily increased each year, resulting in a backlog. To meet this problem, the unions gave priority to certain grievances, *i.e.*, those that involved a discharge or a suspension lasting more than four days. Of the grievances which were processed through to arbitration, those asserted on behalf of black members were proportionate to their numbers in the workforce. Black grievants had a higher success rate than whites in arbitrated complaints. *Id.* at 135a-137a; see also *id.* at 93a-94a, 101a.

Indeed, the district court found that the unions had objected to certain discriminatory practices by the company. For instance, in 1968, the unions protested during collective bargaining negotiations against Lukens' continued use of the Wonderlic Test for screening promotions—a practice that the district court found to have had a racially disparate impact that was not defensible as job-related.[3]

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[3] The district court found that "company representatives dismissed the challenge as being asserted merely on behalf of 'minorities.' " Pet. App. 90a.

And it was found probable that the unions' use of the grievance procedure protected nonprobationary employees from discriminatory discharges. Pet. App. 90a, 101a.

b. The district court did, however, find some *inaction* by the unions to be grounds for liability, on the theory that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well" (Pet. App. 139a). The condemned inaction was found in the unions' "failures, during the limitations period, to include racial discrimination as a basis for grievances or other complaints against the company" (*id.* at 137a). In this connection, the court made three findings.

First, the court found that the unions had a uniform policy of not filing grievances on behalf of probationary employees, for any reason (Pet. App. 137a). And, concluded the court, "[t]he union knew that blacks were being discharged by Lukens ... a disproportionately higher rate than whites" (*ibid.* (citations omitted)).[4]

Second, while the unions objected to Lukens' use of all types of tests, they did not base the objections on the tests' racially disparate impact, although they were "chargeable with knowledge" of the disparity (Pet. App. 137a).

Third, the unions had decided not to assert racial discrimination as the basis for grievances generally, although apparently they would process such complaints on other grounds (Pet. App. 138a; but cf. J.A. 731-732). The unions argued that this policy was a tactical response

[4] The unions argued in the court of appeals that prior to 1974 they had not believed that they had a right to file grievances on behalf of probationary employees, and that after 1974 there were relatively few discharges of probationary employees. Unions' C.A. Br. 53-57. The district court did not dispute the date of most of the discharges (Pet. App. 103a; see also *id.* at 101a), but it did conclude that the unions should have challenged pre-1974 racial discharges (*id.* at 137a).

to Lukens' reluctance to admit discriminatory practices; the district court also found that the company "preferred to avoid confronting racial issues if at all possible" (Pet. App. 119a). Nonetheless, the court rejected this justification, on the grounds that racial harassment grievances could not be recast and because "[t]he clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment" (*id.* at 138a).[5]

Accordingly, the district court enjoined the unions from "failing to challenge discriminatory discharges of probationary employees" (Pet. App. 155a), "failing or refusing to assert meritorious claims of racial discrimination" (*id.* at 157a), and "tolerating or giving tacit encouragement to racial harassment" (*id.* at 158a).

2. The court of appeals affirmed the district court on the issue of the unions' liability. The court listed the relevant provisions of Title VII as Sections 703(c)(1) and (3), 42 U.S.C. 2000e-2(c)(1) and (3).[6] While noting the criticisms that have been made of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), the court apparently endorsed "its premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace" (Pet. App. 25a), and therefore rejected the unions' argument that they had done nothing to "cause" an employer to discriminate under Section 703(c)(3) of Title VII. Further, it stated that "the unions intentionally avoided asserting claims of discrimination," thereby "violat[ing] the duty of fair representation owed to their members" and "the duty to enforce the

[5] A fourth finding by the district court, that the unions were answerable for Lukens' discriminatory initial assignments, was vacated by the court of appeals. No plaintiff adequately represented the class on this claim. Pet. App. 20a.

[6] It did not list Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2), as relevant.

collective bargaining agreement" (Pet. App. 26a (citations omitted)); this violated Section 703(c)(1) of Title VII, too, the court continued, because by their policy the unions "discriminated against the victims who were entitled to representation" (Pet. App. 26a). Finally, the court of appeals held that "[t]he district court's finding of intentional discrimination [sic] properly supports the claims under § 1981 as well" (*id.* at 26a-27a).

SUMMARY OF ARGUMENT

I. A. Liability under Title VII conventionally requires a finding of disparate treatment or disparate impact. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., concurring in part and dissenting in part); *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Here, the courts below found neither with respect to the unions, and accordingly the finding of liability under Title VII should be reversed.

B. Nor should liability be predicated on an alternative theory resting on the unions' failure to file particular grievances in a particular manner against the *employer's* discrimination. There is no more laudable goal for a union than combatting an employer's racial discrimination. But unions have only finite resources, and to hold them liable under Title VII for failing to give absolute priority to this goal cannot be squared with the language or intent of Title VII, fails to afford unions the flexibility they must have as representative bodies, and is antithetical to the basic principle that one has a duty only to police one's own activities.

II. With regard to the court of appeals' 42 U.S.C. 1981 holding, we think *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982), is dispositive. That decision required discriminatory intent on the part of the defendant, and here there was no finding that the unions had such intent. The fact that the unions deliberately

adopted their grievance policies does not suffice, any more than did the fact that the employer in *General Building Contractors* deliberately adopted its hiring policies, since " '[d]iscriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted).

ARGUMENT

I. THE COURTS BELOW ERRED IN FINDING THE UNIONS LIABLE FOR DISCRIMINATION UNDER TITLE VII

A. Plaintiffs Did Not Establish, And The Courts Below Did Not Find, Conduct By The Unions Amounting To Disparate Treatment Or Resulting In A Disparate Impact On Blacks

Neither of the courts below rested its conclusion of union liability on either of the two theories—disparate treatment or disparate impact—upon which Title VII liability has conventionally been predicated. *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., concurring in part and dissenting in part); *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Nor will the record in this case support liability on either theory with respect to the unions.

There was no finding of intentional discrimination by the district court, and no basis on which such a finding could have been supported. While the court of appeals referred to the district court's finding that "the unions intentionally avoided asserting claims of discrimination," the unions' "deliberate choice not to process grievances," and "[t]he district court's finding of intentional discrimination" (Pet. App. 26a-27a), such statements are in context completely ambiguous. The unions' policies certainly were "intentional" and "deliberate" in the sense of being advertent. It does not, however, follow that they were motivated by racial animus. See *Personnel Admin-*

istrator v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted) (" 'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences").

The district court's more specific findings do not suggest that racial animus existed. The court found objectionable the unions' policy "to intentionally avoid[] asserting discrimination claims * * * regardless of whether, as a subjective matter, [the unions'] leaders were favorably disposed toward minorities" (Pet. App. 139a-140a), and its policy of not bringing grievances on behalf of probationary employees even though "[t]he union[s] knew that [black probationary employees] were being discharged by Lukens at a disproportionately higher rate than whites" (*id.* at 137a). But these policies applied equally to black and white employees and thus cannot constitute a case of disparate treatment. While the district court used the words "racial animus" in finding liability under Section 1981 (Pet. App. 138a), we think it plain that such a label was misapplied to decisions made on tactical grounds and lacking any hint of discriminatory motive focused on the race of the claimant.

There is likewise nothing in the record on which to base a finding of disparate impact against the unions, a hypothesis which has heretofore gone virtually unmentioned by the parties and the courts below.[7] With respect

[7] The district court stated that the plaintiffs had made both disparate impact and disparate treatment claims (Pet. App. 51a), but it generally did not distinguish between claims made against the company and claims made against the union, nor between claims premised on one theory rather than the other. In fact, the plaintiffs apparently pleaded only that the transfer and seniority provisions of the collective bargaining agreements negotiated by the unions—a quite different set of issues—gave rise to racial disparities; they clearly did not allege that any of the union practices on which liability was ultimately found gave rise to a disparate impact. See 6/14/73 Complaint—Class Action ¶¶ 48-49.

Indeed, had disparate impact analysis been at issue in the district court, serious questions concerning the role of certain defenses would have been explored. The limiting doctrine of "business"—here, "union"—"necessity" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)) would certainly be applicable, though likely to differ in some respects from business-necessity. Such a defense seems especially plausible here, where tactics, backlog, and limited resources of the unions appear to support their decision to bring certain grievances, and in certain ways. The possibility that certain actions may be justifiable pursuant to a bona fide seniority system also must be recognized and seems potentially relevant with respect to the policy of disfavoring probationary employees with respect to grievances. See *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239 (1982); *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980). See also *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979).

to the employer's tests, the district court pointed out that the unions *did* oppose the use of the tests (Pet. App. 137a)—apparently with some success (see J.A. 331-332, 653-654, 702)—and the court did not suggest that the unions would have been more successful in their opposition had it been based on racial grounds. As to the policy against bringing grievances on behalf of probationary employees, and the failure to pursue racial harassment claims raising no other violation of the contract, there was simply no finding regarding the effects of those policies on any particular racial group. With regard to the handling of grievances in all other respects, the district court found evidence of discrimination "inconclusive," and found that there was "no hard evidence to support an inference that [the unions'] inadequacies [in processing grievances] disadvantage blacks to a greater extent than whites" (Pet. App. 135a; see also *id.* at 93a-94a, 101a). The court of appeals noted the district court's conclusion that "the plaintiffs had failed to present adequate proof of discrimination" regarding "[p]rocessing grievances by the

unions insofar as the complaints centered on the number of grievances which the locals presented initially and pursued through arbitration" (*id.* at 6a). Indeed, the district court further observed that as to grievances reaching arbitration, success was achieved by black employees at a rate 50 percent higher than achieved by whites (*id.* at 136a).

Since neither disparate treatment nor disparate impact was proven or found to exist by either of the courts below, liability can only be justified on some alternative theory.[8] That theory rests on the unions' perceived failure vigorously and successfully to pursue, using the terminology of racial discrimination, complaints of discrimination by the employer. Such a theory of liability, based on passive acquiescence in discrimination by the employer, is without precedent in the decisions of this

[8] Plaintiffs might have argued in the courts below that the unions' failure to bring grievances on behalf of probationary employees, and their alleged failure to pursue in any way certain racial harassment claims, gave rise to Title VII liability on the part of the unions because that conduct had a disparate impact on black employees (as discussed, the opinions of the courts below make clear that there was no disparate impact on blacks resulting from the way in which the unions pursued individual non-harassment grievances (Pet. App. 135a-137a)). It is conceivable, though not clear on the record, that these policies may have had an impact on blacks more adverse than on members of other racial groups. We stress again, however, that such a theory was neither advanced by the plaintiffs in their complaint nor presented in the form of evidence or argument at trial. Because the theory was at no time asserted, no defenses to it were articulated or established by the unions. The issue not having been raised by the parties, it properly played no part in the decisions of the trial and appellate courts. As a general proposition, this Court has made clear its reluctance to consider alternative theories of Title VII liability which were in no way dealt with in the courts below. *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 580-581. In any event, the issue is certainly of sufficient difficulty that it should be considered by this Court only in a case which has had full litigation and consideration in the lower courts.

Court,[9] though it has appeared in the jurisprudence of the lower courts.[10] It is without basis in Title VII, and for that reason the decision of the court below must be reversed.

[9] This Court has not heretofore addressed the Title VII question at issue here. The court of appeals, however, seems to have thought that the decision in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), was relevant, saying that it rejected "the union's defense that in representing a number of employees it is sometimes necessary to compromise the grievance of one" (Pet. App. 26a). *McDonald* does not, however, endorse the proposition that a union may *never* compromise one employee's grievance for the sake of others' grievances; such a rule would make it impossible for a union to represent any grievants at all. Nor does *McDonald* create union liability for an *employer's* practices. The most that *McDonald* can be construed to say is that a union is liable to employees under Title VII if the union itself intentionally discriminates against them—for example, if the union negotiates penalties from the employer that take account of the employees' race, and that differ in severity along explicitly racial lines. 427 U.S. at 284-285. It is undisputed that such intentional discrimination would breach Title VII; that is, however, not the present case.

[10] For instance, the leading case of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973), spoke of "union passivity" and "affirmative union obligation under Title VII." *Chrapliwy* v. *Uniroyal, Inc.*, 458 F. Supp. 252, 282-283 (N.D. Ind. 1977), adopted *Macklin's* approach, adding that union "action [against the employer's sex discrimination] must be initiated whether or not a female employee complains to the Union of discriminatory treatment" (citation omitted). *Dickerson* v. *United States Steel Corp.*, 439 F. Supp. 55, 62 (E.D. Pa. 1977), later proceeding, 472 F. Supp. 1304, 1353 n.41 (1979), vacated and remanded on other grounds *sub nom. Worthy* v. *United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980), spoke in terms of "vicarious liability." In *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. 1981), vacated on other grounds, 456 U.S. 955, cert. denied, 456 U.S. 972 (1982), the court said that unions have the "legal requirement of taking every reasonable step to bring employment practices into compliance with the law." Another court has said that unions must "insure [employer] compliance" with Title VII. *Romero* v. *Union Pac. R.R.*, 615 F.2d 1303, 1310-1311 (10th Cir. 1980). A diverging line of authority, truer to the language and intent of Title VII, apparently holds that a union is implicated in an employer's violations only if the union

B. Unions Are Not Liable Under Title VII Merely For Failing To Take Affirmative Steps To Combat Discrimination By The Employer

There is no more laudable goal for a union than combatting an employer's racial discrimination. But unions have only finite resources, and to hold them liable under Title VII for failing to give absolute priority to this goal cannot be squared with the language or intent of Title VII, fails to afford unions the flexibility they must have as representative bodies, and is antithetical to the basic principle that one has a duty only to police one's own activities.

1. Title VII deals separately with the liability of unions as distinct from employers (Section 703(c), 42 U.S.C. 2000e-2(c)):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

itself treated similarly situated employees differently on racial (or other prohibited) grounds. See, *e.g.*, *Babrocky* v. *Jewel Food Co. & Retail Meatcutters Union*, 773 F.2d 857, 868 (7th Cir. 1985); *Tate* v. *Weyerhaeuser Co.*, 723 F.2d 598, 606-607 (8th Cir. 1983), cert. denied, 469 U.S. 847 (1984); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 424-426 (6th Cir. 1974). One commentator has noted that "[m]ost courts * * * appear to rely upon previous decisions for the proposition that acquiescence alone can produce liability, with little attention to the statute, so that the proposition survives as much on the strength of repetition as on careful analysis." And *Macklin*, the decision most "rel[ied] upon," "provides an infirm base upon which to found a proposition of law, and it quite possibly states a broader rule than is necessary." 1 A. Larson & L. Larson, *Employment Discrimination* § 44.42, at 9-27 to 9-28 (1985).

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

On its face, this language appears to present a prohibition against various discriminatory acts by a union. One looks in vain for admonitions of affirmative duty to combat or prevent someone else's discriminatory conduct, or any suggestion that union liability could be predicated on such grounds.[11] Though Sections 703(c)(1) and (2), dealing with unions' liability, contain catch-all phrases such as "or otherwise to discriminate," the structure of Section 703(c) suggests that 703(c)(1) and (2) focus on matters of membership and on internal union affairs, while it is Section 703(c)(3) which most specifically addresses the interaction between the union's conduct and the conduct of the employer. See Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 721 (1980). And that provision clearly states that it is only when a union "cause[s] or attempt[s] to cause" an employer's discrimination that it is liable. Moreover, Section 703(c)(3) was taken

[11] It is also instructive to examine a statutory model creating vicarious liability for a failure or refusal to act that Congress chose *not* to follow in framing Section 703(c). That statute, 42 U.S.C. 1986, imposes liability on every person who, "having knowledge" that Section 1985 violations are to be committed, and "having power to prevent or aid in preventing the[m]," "neglects or refuses to do so, if such wrongful act be committed."

in haec verba from the National Labor Relations Act, 29 U.S.C. 158(b)(2) (Section 8(b)(2) of the NLRA), and this section had already been given a "restricted" meaning by the courts, narrower even than "to induce" or "to encourage." *Electrical Workers* v. *NLRB,* 341 U.S. 694, 703 (1951); see also *NLRB* v. *Teamsters,* 317 F.2d 746, 749 (2d Cir. 1963) ("suggestion" or "compulsion"); *NLRB* v. *Jarka Corp. of Philadelphia,* 198 F.2d 618, 621 (3d Cir. 1952). "To say that the union 'causes' employer discrimination simply by allowing it is to stretch the meaning of the word beyond its limits." 1 Larson, *supra,* § 44.50, at 9-40. Cf. *Monell* v. *New York City Dep't of Social Services,* 436 U.S. 658, 691-692 (1978).

2. The legislative history confirms that Congress did not intend to expand a union's responsibility for the employer's wrongdoing. As a general matter, of course, the Congress which passed Title VII insisted that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *United Steelworkers* v. *Weber,* 443 U.S. 193, 206 (1979) (quoting H.R. Rep. 914, 88th Cong., 1st Sess., Pt. 2, at 29 (1963)). On other occasions, this Court has cautioned against reading Title VII so expansively that the rest of the labor statutory scheme is disrupted. See, *e.g., Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 69 (1975); *TWA* v. *Hardison,* 432 U.S. 63, 79 (1977); cf. *W.R. Grace & Co.* v. *Rubber Workers,* 461 U.S. 757, 771 (1983).

During the lengthy Senate debate, the bill was criticized by Senator Hill as a threat to the labor movement because "all of the rights which a union has under the National Labor Relations Act [NLRA] or the Railway Labor Act could be suspended." 110 Cong. Rec. 487 (1964). Senator Clark, one of the two bipartisan floor managers of Title

VII, made a detailed reply to these objections on April 8, 1964.[12] Clark had requested the Department of Justice to prepare a memorandum rebutting Hill's arguments; during his reply to the criticisms he placed this memorandum in the record. The memorandum stated (110 Cong. Rec. 7206-7207) that "[n]othing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act" and that "title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now." Under the labor laws existing at that time unions had a "duty of fair representation," forbidding them from engaging in discrimination, inter alia, on the basis of race. See *Steele* v. *Louisville & Nashville R.R.,* 323 U.S. 192 (1944); *Wallace Corp.* v. *NLRB,* 323 U.S. 248 (1944); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). In *Humphrey* v. *Moore,* 375 U.S. 335 (1964), handed down on January 6, 1964, nine days before Senator Hill claimed that Title VII would impliedly repeal unions' statutory rights, the Court dealt with the scope of a union's "duty of fair representation" arising under Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), and emphasized the breadth of discretion allowed to unions under national labor policy. It reaffirmed that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion" (375 U.S. at 349, quoting *Ford Motor Co.* v. *Huffman,* 345 U.S. at 338), and added (375 U.S. at 349-350):

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the griev-

[12] Senator Clark also chaired the subcommittee of the Senate Labor and Public Welfare Committee that had held hearings on the bill and that brought it to the Senate floor.

> ance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

The Court ruled that the union had not breached its duty of fair representation because it "took its position honestly, in good faith and without hostility or arbitrary discrimination" (*id.* at 350).[13] Thus, there is no reason to suppose that Congress intended Title VII to create a broad, new union duty to grieve employer misconduct.

It would, of course, have been remarkable if Congress had intended to visit liability for an employer's discrimination on the union, or vice versa. Employers and unions "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375, 394 (1982), quoting *NLRB* v. *Insurance Agents,* 361 U.S. 477, 488 (1960)). It is, therefore, unsurprising to find the

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[13] Under post-1964 case law, and most notably under the leading case of *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967), a breach of the NLRA's duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" (citations omitted). Indeed, this Court has indicated that a breach requires "deliberate and severely hostile and irrational treatment." *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301 (1971).

In this case, of course, plaintiffs have not alleged a violation of Section 9(a), 29 U.S.C. 159(a), which is the statutory source of the duty of fair representation.

following exchange in the Senate debate on Title VII (110 Cong. Rec. 7217 (1964) (emphasis added)):

> [Sen. Dirksen:] If an employer obtains his employees from a union hiring hall through operation of his labor contract, is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? *If the hiring hall sends only white males, is the employer guilty of discrimination* within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
>
> [Sen. Clark:] An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. *If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be.*

Cf. *General Building Contractors Ass'n* v. *Pennsylvania, supra; Northwest Airlines, Inc.* v. *Transport Workers,* 451 U.S. 77 (1981) (employer has no right of contribution from union for former's liability under Title VII for discriminatory wage differentials collectively bargained for). If, under Title VII, an employer cannot be held liable for failing to identify and counteract union discrimination in the referral of employees, there can be little basis for holding a union liable when it fails to take affirmative measures to combat an employer's discrimination.

This conclusion is reinforced by the absence of any contrary suggestion in the lengthy debate concerning the manner in which Title VII would be enforced, the resolution of which was critical to the enactment of the 1964 Civil Rights Act. See 110 Cong. Rec. 12595-12596 (1964) (remarks of Sen. Clark). Senator Humphrey stated that the Senate's changes in the House bill were "concerned

chiefly with procedures for enforcement" (*id.* at 12707). Yet apparently no one, either friend or foe of the bill, suggested that Title VII would impose significant enforcement responsibilities on unions. Nor did Congress say that the unions' "duty of fair representation" was to be expanded. Rather, Congress clearly left the task of enforcement to private plaintiffs and specified governmental bodies and did not contemplate implied rights of action against nonviolators. See *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U.S. at 93-94 (footnote omitted) ("The comprehensive character of the remedial scheme fashioned by Congress [in Title VII] strongly evidences an intent not to authorize additional remedies"); *NAACP* v. *FPC,* 425 U.S. 662 (1976). It is therefore apparent from the language and legislative history of Title VII that unions were to retain their freedoms and prerogatives to the extent consistent with their duty not to discriminate.[14]

[14] The passive acquiescence theory adopted by the courts below could be applied with equal facility and no less justification to a whole array of federal statutes. If, for instance, an employer has violated employees' statutory rights under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, then unions might be held liable to the extent that they had failed to protest or to protest effectively. The Equal Pay Act, 29 U.S.C. 206(d), the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, and other federal statutes designed to benefit employees could also be read to imply causes of action against unions for failure to aid in preventing employers' violations. Unions would become all-purpose enforcement agencies for the entire array of employees' statutory rights, with respect not only to employer discrimination, but also to hazardous working conditions, job-related diseases, pension funds, wages and hours, and so on.

Such a radical conception of the union's obligations would burden the collective bargaining process, require unions to expend substantial resources monitoring employers, expose them to the risk of severe financial liabilities, and displace existing enforcement mechanisms. And such a sweeping reordering of roles and priorities surely requires an unequivocal mandate from Congress. See *Rosen* v. *Hotel & Restaurant Employees,* 637 F.2d 592, 599 n.10 (3d Cir.), cert. denied, 454 U.S. 898 (1981) (denying union's ERISA liability for "failure to oversee" employer); *Bryant* v. *United Mine Workers,* 467 F.2d 1, 6 (6th Cir. 1972), cert. denied, 410 U.S. 930 (1973) (denying union liability for mine operators' failure to comply with Federal Mine Safety Code standards).

And thus their discretion over the grievance process, subject to the command that they not discriminate, was intended to remain extensive.[15]

3. The court of appeals would here impose liability on the unions in a distinct set of circumstances: where the unions at most made deliberate but good faith tactical decisions as to how much, in which cases, and by what arguments they would challenge allegations of discrimination by the employer, discrimination to which they had not become a party by, for instance, signing a collective bargaining agreement with provisions sanctioning or mandating discrimination. This Court has never imposed liability on a union in this sort of case, even on a more familiar disparate impact theory. We submit that imposing liability on the union here would have significant and unexpected implications once it is appreciated what is distinctive about a union acting in this kind of a representative capacity.

[15] Indeed, to avoid Title VII liability under an "affirmative duty" standard, unions would have to press for employers' recognition of the statutory rights of individuals, although Congress conceived of those rights as independent of the collective bargaining process. See, *e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). And in order to ensure those rights, unions would have to sacrifice their bargaining advantages on other negotiating fronts, leaving them—and the employees they represented—in a weaker position overall in dealing with management. Ironically, the more discriminatory an employer's conduct, the more a union would have to concentrate its demands on the issue of discrimination, and the weaker it would be in all other bargaining areas. Congress clearly did not mean to force unions (and thus employees) to seek, as a mere concession from employers and in exchange for concessions on their part, what it chose to vest in employees as an indefeasible legal right.

The unique functions unions perform must be kept in view when considering the Title VII liability to which they may be subject. As we have argued, the statute itself recognizes such a distinct role, dealing with the union's liability in Section 703(c) and the employer's liability in Section 703(a), 42 U.S.C. 2000e-2(a). Further, this inference from the statutory scheme not only cautions against some of the more expansive theories of union liability, tending as they do to a theory of vicarious liability,[16] it invites attention to the differing role and nature of employers and unions. Except when the union is itself an employer (see 42 U.S.C. 2000e(a) and (b)) or when it in effect takes over employment decisions for an employer (see *General Building Contractors, supra*), a union exists to represent the bargaining unit employees' interests and to press their claims with the employer. A labor union under the scheme of the national labor laws is a democratically controlled, representative institution, compelled by law to reflect the will of its constituents subject to the duty of fair representation of all in the bargaining unit. An employer, by contrast, has an altogether different relation to his employees. They are not his constituents but rather his agents and instruments.

In these respects a union is more like a limited purpose governmental unit in its relations with its members. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. at 202 ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J.I. Case Co.* v. *Labor Board,* [321 U.S.

[16] We would note that holding a union liable under a disparate impact theory in a case like this one—where the union has done nothing but fail to challenge (with some unspecified measure of insistence and success) an *employer's* discrimination—looks very much like the "passive acquiescence" standard which, as we discussed earlier, is inconsistent with the language and intent of Title VII.

332, 335 (1944)], but it has also imposed on the representative a corresponding duty"); see also *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). Of course, like a governmental unit, if a union intentionally discriminates it is rightly subject to liability and sanctions. See Note, *Union Liability for Employer Discrimination,* 93 Harv. L. Rev. 702, 721 (1980) (footnote omitted) ("A union's passivity violates [Section 703(c)(1)] only if its intent in remaining inactive was to discriminate"). And when a government (or a union) acts as an employer it is subject to the same disparate impact analysis as other employers. *New York City Transit Authority* v. *Beazer,* 440 U.S. 568 (1979); *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977). But this Court has declined to subject governments to liability under more expansive theories of liability in their governmental functions: a representative entity must always balance and order the various claims and interests of those whom it represents. Cf. *Alexander* v. *Choate,* 469 U.S. 287, 306-309 (1985); *Personnel Administrator* v. *Feeney, supra; Washington* v. *Davis,* 426 U.S. 229, 246-248 (1976); *Jefferson* v. *Hackney,* 406 U.S. 535, 549-551 (1972). A union's allocation of time, resources, or political capital to one set of claims necessarily subtracts from what is available to competing claims and interests, and Congress in Title VII did not seek to impose any particular set of priorities on labor unions, or to require that certain claimants get preferential treatment. Cf. *Wimberly* v. *Labor & Industrial Relations Comm'n,* No. 85-129 (Jan. 21, 1987), slip op. 5-6. Combatting discrimination is an important union goal, but so is seeking a safe and healthy workplace environment; unemployment, accident, and sickness coverage; and higher wages. "The complete satisfaction of all who are represented is hardly to be expected," and a "[w]ide range of reasonableness must be allowed a statutory bargaining representative." *Ford*

Motor Co. v. *Huffman,* 345 U.S. at 338; see also *Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 742 (1981). Thus, Congress did not contemplate an open-ended mandate to courts to determine when a union, acting consistently with its NLRA duty of fair representation and with no racial animus, has or has not given the claims and grievances of its minority members just the right amount and just the right kind of attention.

As this Court discussed in *Electrical Workers* v. *Foust,* 442 U.S. 42, 48-52 (1979), unions must be afforded flexibility in their grievance actions. In declining to allow a member to receive punitive damages where the union missed a grievance filing deadline, the Court stressed the same factors which are most relevant here: "an employee can recover in full from his employer" (*id.* at 49); awards against unions "could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents" (*id.* at 50-51) and "curtail[ing] the broad discretion that *Vaca* afforded unions in handling grievances" (*id.* at 51); if the unions are held liable, they "might feel compelled to process frivolous claims or resist fair settlements" (*id.* at 52); thus, "[a]bsent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions" (*ibid.*). See also *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. at 180.

To be sure, unions have been held to a duty of fair representation under Section 9(a) of the NLRA, 29 U.S.C. 159(a), but that duty recognizes that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman,* 345 U.S. at 338; see also *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301 (1971) (breach of duty requires "deliberate and severely hostile and irrational treatment"); *Vaca* v. *Sipes,* 386 U.S. at 190 (breach if treatment is "arbitrary, discriminatory, or in bad faith"). The terms of the duty of fair representation are different and less intrusive upon the union's performance of its representative function than would be theories that imposed liability on a union for failing to neutralize an employer's discrimination, theories which would threaten to subvert the very wide discretion for good faith conduct which this Court has found to be appropriate.[17]

Further, although the union's status as exclusive bargaining agent for all the employees of a bargaining unit in general forces individuals or groups of individuals to pursue their claims and grievances exclusively through the union—*Emporium Capwell Co.* v. *Western Addition Community Organization, supra; J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 338-339 (1944)—it has been clearly

[17] The court of appeals stated that "the district court found that the unions intentionally avoided asserting claims of discrimination. In so doing the unions violated the duty of fair representation owed to their members" (Pet. App. 27a). There, indeed, is confusion compounded. First, the odd phrase "intentionally avoided asserting claims" of course conceals the fact that no more was proved than that there was a knowing tactical choice to press such claims, but not in terms of racial discrimination. See pages 7-8, *supra.* There is no finding of an improper motive for this choice. Second, such tactical choices by no means rise to the level of, for example, "deliberate and severely hostile and irrational treatment" required to support an action for breach of the duty of fair representation. Third, it is not at all clear what the relevance to a Title VII action of such a breach of another statutory duty would be, even if it had been pleaded (it was not) or were remotely within the range of proof. Compare *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. at 70-73 (Title VII violation does not establish NLRA violation); *Alexander* v. *Gardner-Denver Co., supra;* see generally 1 Larson, *supra,* § 44.20, at 9-18 to 9-22, § 44.50, at 9-40; Note, *Union Liability for Employer Discrimination,* 93 Harv. L. Rev. 702, 719-724 (1980); pages 14-16, *supra.*

established that Title VII claims may be brought outside the usual union representational route by individuals and groups who choose to do so, consulting only their own interests. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). And this would strongly suggest that an extension of doctrine which would in effect compel the union to bring such claims with some unspecified measure of priority not only was not contemplated in the overall scheme of the labor laws; it is quite unnecessary.

4. Finally, any theory of liability which would impose Title VII liability on a union in circumstances such as those in this case would conflict with the basic principle that one is liable only for one's own misdeeds, not for those of another; there is, in other words, generally no affirmative duty to stop another from violating the law. This Court has already applied this principle in *General Building Contractors Ass'n* v. *Pennsylvania, supra,* discussed in the next section. The language of Section 1981 "does not speak in terms of duties," and the statute does not impose an "affirmative obligation," to guarantee minority rights "as against third parties who would infringe them"; rather, it requires only that persons themselves "refrain from intentionally denying blacks" their rights under the statute (458 U.S. at 396). The principle has also been applied in several cases brought under 42 U.S.C. 1983. *Polk County* v. *Dodson,* 454 U.S. 321, 326 (1981) ("official policy must be 'the moving force of the constitutional violation'" in order to establish Section 1983 liability, quoting *Monell* v. *New York City Dep't of Social Services,* 436 U.S. at 694); *Rizzo* v. *Goode,* 423 U.S. 362, 376 (1976) (positing a "duty" to eliminate constitutional violations for those who played no affirmative part in committing them and a "right" for others to have this duty performed "blurs accepted usages and meanings in the English language in a way which would be inconsistent with the words Congress chose in Section 1983");

Monell, 436 U.S. at 691-692 ("language cannot be easily read to impose liability vicariously" where Congress "specifically provide[d] that A's tort became B's liability if B 'caused' A to subject another to a tort"). The clear distinction drawn between union liability and employer liability in Title VII, and Congress's desire to maintain the well-established division of rights and responsibilities between the two, indicates that this principle—of responsibility only for one's own actions—should apply a fortiori to Title VII.[18]

II. THE COURTS BELOW ERRED IN FINDING THE UNIONS LIABLE UNDER 42 U.S.C. 1981

Insofar as the decision of the lower courts is based on Section 1981, it conflicts with this Court's holding in *General Building Contractors Ass'n* v. *Pennsylvania, supra.* In that case, a union discriminated against blacks in its referrals to employers from a union-operated hiring hall. The employers in the case had agreed to hire only on the basis of the union's referrals. No claim was made that the employers had themselves discriminated; nonetheless, the lower courts had held them vicariously liable for the union's discrimination, on the ground that they had "a

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[18] The Court made a "cf." cite to *Furnco Construction Co.* v. *Waters,* 438 U.S. at 577-578, a Title VII case, in *General Building Contractors* for the proposition that, in passing Section 1981, Congress "did not intend to make [employers] the guarantors of the workers' rights as against third parties who would infringe them" (458 U.S. at 396). And in *Teamsters* v. *United States,* 431 U.S. 324, 353 (1977), this Court said it "would be a perversion of congressional purpose" in passing Title VII to "place an affirmative obligation on the parties to a seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority." See also *Carpenters Local 46* v. *Eldredge,* 459 U.S. 917, 921-922 (1982) (Rehnquist, J., dissenting from denial of certiorari).

'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392.[19]

This Court reversed, holding that Section 1981 is violated only by "purposeful discrimination," *i.e.*, by "racially motivated" actions or "blatant deprivations of civil rights, clearly fashioned with the purpose of oppressi[on]." 458 U.S. at 388, 391. The employers were held to have no affirmative obligation to protect those against whom the union discriminated, since they were not "the guarantors of workers' rights as against third parties who would infringe them" (*id.* at 396); intentional discrimination of the kind required under Section 1981 could not be proved by showing that the employers had "failed to ensure" nondiscriminatory employment opportunities (*id.* at 397). This Court has since reaffirmed that "[u]nder [Section 1981] relief is authorized only when there is proof or admission of intentional discrimination." *Firefighters Local Union No. 1784* v. *Stotts,* 467 U.S. 561, 583 n.16 (1984) (citing *General Building Contractors*).

In this case the plaintiffs apparently contend that the "intent" requirement of Section 1981 was satisfied by the finding that the unions had intentionally decided not to grieve certain complaints, or to grieve them in certain ways. See Pet. App. 26a. But not every volitional act will provide the requisite intent. For liability to be found, the unions must be shown to have made decisions from racial motives, and no such proof exists here. See *Personnel Administrator* v. *Feeney,* 442 U.S. at 279.[20] Just as employers

[19] No Title VII claim was brought against the employers. 458 U.S. at 380.

[20] Whether the union knew the employer was discriminating matters only insofar as it bears on the factual determination of whether the union intended its action to be discriminatory (see *Feeney,* 442 U.S. at 279 n.25); because in this case there was no finding of the latter, the presence of the former is at this point legally irrelevant. Here, conversely, both courts below seemed to think it irrelevant whether or not the unions were "favorably disposed toward minorities" (Pet. App. 25a, 140a).

are not, under Section 1981, the third party guarantors against union discrimination, so unions should not be guarantors against employers' Section 1981 discriminaton. If the fundamental divergence of interests between union and employer precludes an assumption that the latter is liable for the former's discrimination, no agency relation can be presumed to run the other way either. See 458 U.S. at 391-395; *id.* at 403-404 (O'Connor, J., concurring). Hence the unions here had no duty under Section 1981 to take affirmative steps to end Lukens' discrimination, and their decisions not to file grievances against the employer in some situations cannot have been a breach of duty.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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